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**IN THE
SUPREME COURT OF THE UNITED STATES**

October Term, 1993

JOHN JOSEPH ROMANO,
Petitioner,

v.

THE STATE OF OKLAHOMA,
Respondent.

BRIEF OF RESPONDENT

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QUESTION PRESENTED

Does admission of evidence that a capital defendant has previously been sentenced to death in another case impermissibly undermine the sentencing jury's sense of responsibility for determining the appropriateness of the defendant's death sentence, in violation of the Eighth and Fourteenth Amendments?

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OCTOBER TERM 1992

JOHN JOSEPH ROMANO,

Petitioner,

v.

THE STATE OF OKLAHOMA,

Respondent.

BRIEF OF RESPONDENT

Respondent, the State of Oklahoma, by and through Susan Brimer Loving, Attorney General of the State of Oklahoma, respectfully requests that this Court affirm the decision of the Oklahoma Court of Criminal Appeals.

OPINION BELOW

The published opinion of the Oklahoma Court of Criminal Appeals is recorded at Romano v. State, 847 P.2d 368 (Okla. Crim. App. 1992) cert granted, in part Romano v. Oklahoma, ____ U.S. ____, 114 S.Ct. 380, 126 L.Ed.2d 330 (1993).

JURISDICTION

Jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1257 (a).

STATEMENT OF THE CASE

John Joseph Romano, hereinafter referred to as the "defendant," is incarcerated pursuant to a Judgment and Sentence rendered in the District Court of Oklahoma County, State of Oklahoma, Case No. CRF-87-397.

The defendant and his co-defendant, David Wayne Woodruff, were convicted of two separate murders in Oklahoma County, which occurred approximately nine (9) months apart.

The murder of Roger Sarfaty occurred sometime between October 10 and October 15, 1985. The murder of Lloyd Thompson occurred on July 19, 1986. The defendant and Woodruff were first tried and convicted for the Thompson murder. Subsequently, in May 1987, the defendant and Woodruff were tried and convicted for the Sarfaty murder. Both defendants received sentences of death in both murder cases.

The issues before this Court arise from the second trial, that dealing with the murder of Roger Sarfaty. Those issues, however, deal with the admissibility of the conviction and sentence from the Thompson murder which was introduced in the sentencing stage of the Sarfaty murder.

The defendant knew Roger Sarfaty, who was an independent jewelry dealer (Tr. III, 143, 174). After one business transaction with Sarfaty, the defendant told a friend of his, Tracy Greggs, that they should rob and kill Sarfaty, emphasizing that Sarfaty would have to be killed because he would be able to identify them (Tr. III, 175, 176).

On October 12, 1985, the defendant and Woodruff went to an Oklahoma City shopping mall. They went into a electronics store, where the defendant knew the manager. Both men were intoxicated and had glasses of beer with them (Tr. IV, 21). At one point the manager noticed a stain on the

defendant's pants which looked like blood. When she asked him about it, he stated that he had cut his hand while painting a house (Tr. IV, 22). Both the defendant and Woodruff pulled a large sum of quarters¹ from their pockets, telling the manager that they had plenty of money (Tr. IV, 23, 29).

The manager called security and the defendant and Woodruff were eventually picked up by Oklahoma City police officers and charged with public intoxication. At the relaxed check-in at the detox center where the men were taken, one officer noticed that the defendant was wearing an expensive looking heavy gold necklace (Tr. IV, 62). After the men were released from the detox center, Woodruff's girlfriend

took them back to the mall to get Woodruff's car. She noticed a number of diamond papers scattered on the ground next to the passenger's side of the car (Tr. IV, 77).

On October 15, 1985, Woodruff mailed a quantity of jewelry to a man in California (Tr. IV, 76, 122). On October 16, 1985, the defendant called Woodruff. Following the call Woodruff and his girlfriend drove by Sarfaty's apartment, where they saw police cars (Tr. IV, 87). Incriminating evidence was found in Woodruff's apartment when he was arrested (Tr. IV, 92). The defendant spontaneously remarked to some people at a pool hall that he could not have killed Sarfaty because he was

¹Acquaintances of Roger Sarfaty testified that he kept large quantities of quarters in his apartment, but none were found when his body was discovered. (Tr. III, 37, 69, 134).

incarcerated² at the time of the murder (Tr. IV, 127).

Evidence presented during the second stage of trial revealed that, in addition to the Thompson conviction, the defendant had previously been convicted of two separate charges of obtaining money by bogus check, and second degree forgery (Tr. VI, 45).

The Thompson murder convictions were reversed on direct appeal, due to the improper joinder of the defendant's trial with that of the co-defendant, Woodruff. Romano v. State, 827 P.2d 1335 (Okla. Crim. App. 1992); Woodruff v. State, 825 P.2d 293 (Okla. Crim. App. 1992).

During the sentencing phase of the Sarfaty trial, the jury found that there

²Evidence established that the defendant was incarcerated at the Enid Community Treatment Center, but regularly received weekend passes (Tr. III, 165, 166).

was a probability that the defendant constituted a continuing threat to society, that he had previously been convicted of a felony involving violence, that the murder was committed to avoid arrest or lawful prosecution, and that the murder was especially heinous, atrocious, or cruel. Having found the existence of four (4) of the aggravating circumstances necessary under Okla.Stat.tit. 21, § 701.12 (1981) before a penalty of death can be imposed, the jury then assessed the death penalty. The trial court followed the recommendation of the jury.

The defendant filed a direct appeal from the Sarfaty conviction, which was affirmed by the Oklahoma Court of Criminal Appeals at Romano v. State, 847 P.2d 368 (Okla. Crim. App. 1992). On direct appeal, the "prior violent felony conviction" aggravator was stricken because the

Thompson murder conviction³ had been reversed on appeal, subsequent to the defendant's trial in this case.

However, the Court of Criminal Appeals found that evidence of the Thompson murder was properly considered in regard to the "continuing threat" aggravating circumstance, as the Thompson murder conviction was not reversed because of the sufficiency of the evidence, but because of improper joinder of the defendants. After reweighing the remaining aggravators against the mitigating evidence, the Court of Criminal Appeals upheld the sentence of death.

³While the defendant had other prior felony convictions, mentioned above, none involved the use or threat of violence, and thus could not be considered in support of this aggravating circumstance.

SUMMARY OF THE ARGUMENT

I.

Evidence of a prior death sentence does not violate the Eighth Amendment under the holding of Caldwell v. Mississippi, nor the Fourteenth Amendment's due process clause, because it does not inform the jury that the ultimate responsibility for the determination of the defendant's sentence lies elsewhere. Evidence of a defendant's prior murder conviction is certainly relevant evidence to which a sentencer is entitled in a capital case. And, arguably, the sentence the defendant received for that conviction is also relevant evidence for the sentencer.

II.

The Oklahoma Court of Criminal Appeals determined that it was error for the defendant's prior death sentence to be revealed on the Judgment and Sentence that was introduced in aggravation in the

defendant's murder trial. However, the Oklahoma Court applied a harmless error analysis and determined that the prior death sentence evidence could not have affected the jury's sentencing verdict in this case.

The Oklahoma Court's analysis was proper, and was in line with a number of other jurisdictions, who refuse to apply a per se reversible error rule to this type of evidence.

ARGUMENT

I.

ADMISSION IN THE SENTENCING STAGE THAT THE DEFENDANT HAD ALREADY RECEIVED A PRIOR DEATH SENTENCE DID NOT IMPERMISSIBLY UNDERMINE THE JURY'S SENSE OF RESPONSIBILITY IN VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENTS.

In order to satisfy federal constitutional standards, the death penalty must be applied in a consistent and rational manner. This Court has stated that the Eighth Amendment requires a heightened "need for reliability in the determination that death is the appropriate punishment in a specific case." Woodson v. North Carolina, 428 U.S. 280, 305, 96 S.Ct. 2978, 49 L.Ed.2d 944 (1976) (plurality opinion).

A State may not limit a jury's consideration of mitigating circumstances presented by the defendant. Lockett v. Ohio, 438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978). A State must

sufficiently define aggravating circumstances to narrow the class of criminal defendants to which the death penalty applies. Godfrey v. Georgia, 446 U.S. 420, 100 S.Ct. 1759, 64 L.Ed.2d 398 (1980). At the heart of Eighth Amendment jurisprudence is the requirement that those States that have the death penalty as an option must "adopt procedural safeguards protecting against arbitrary and capricious impositions of the death sentence." Sawyer v. Whitley, 505 U.S. ___, 112 S.Ct. 2514, 120 L.Ed.2d 269, 281 (1992).

Oklahoma has adopted procedural safeguards against the improper imposition of the death penalty. While aggravating circumstances are limited to those specified under statute, there are no limitations imposed on mitigating evidence. Okla.Stat.tit. 21, § 701.10 (1981). The statutory aggravating circumstances have been narrowed to satisfy constitutional

safeguards. Okla.Stat.tit. 21, § 701.12 (1981). Capital trials are conducted in bifurcated proceedings, with all relevant evidence as to sentencing presented during the sentencing stage. The defendant must receive prior notice of the evidence which the State plans on presenting in aggravation, and the State is statutorily prohibited from presenting any evidence of which the defendant does not have notice. Okla.Stat.tit. 21, § 701.10 (1981). The defendant has the right to address and attempt to rebut the aggravating evidence. The defendant may present mitigating evidence. The jury is not limited in its consideration of mitigating evidence, but it is limited to consider only the aggravating circumstances alleged. The jury must find that the aggravating circumstance(s) outweigh the mitigating evidence before it may impose the death penalty. Okla.Stat.tit. 21, § 701.11

(1981). Even then, it is not required to impose the death penalty. The jury is instructed to give the defendant the benefit of the doubt in determining the aggravating circumstances.

The issue presented here is whether or not a Judgment and Sentence introduced during the sentencing stage of a capital proceeding, which reflected that the defendant had a prior death sentence, caused the jury to ignore all the sentencing stage evidence and instructions and impose the death penalty arbitrarily, merely because the defendant had already received one death sentence.

This Court has "defined the category of infractions that violate 'fundamental fairness' very narrowly based on the recognition that, '[b]eyond the specific guarantees enumerated in the Bill of Rights, the Due Process Clause has limited operation.'" Medina v. California, 505

U.S. ___, 112 S.Ct. 2572, 120 L.Ed.2d 353, 362, (1992). In Medina, the Court affirmed that the Due Process Clause did not "establish this Court as a rule-making organ for the promulgation of state rules of criminal procedure." Medina, *ibid*.

The defendant asks this Court to establish a per se rule holding that the introduction of evidence of a prior death sentence in a capital proceeding violates the defendant's Eighth and Fourteenth Amendment rights, and ipso facto requires a reversal of the proceedings.

The respondent asks this Court to find that the introduction of the prior death sentence in this case did not undermine the jury's sense of responsibility in imposing the death penalty, and to refuse to apply a per se rule prohibiting this type of evidence. As the authority below will show, other States have applied harmless error analysis to this evidence, have ruled

the evidence not to be error at all, and have even found that the defendant had legitimate reasons to seek introduction of the evidence.

A. The Evidence of a Prior Death Sentence Does Not Automatically Violate the Holding of Caldwell v. Mississippi.

In Caldwell v. Mississippi, 472 U.S. 320, 105 S.Ct. 2633, 86 L.Ed.2d 231 (1985) this Court found that the defendant's Eighth Amendment rights had been violated by a prosecutor's comments, endorsed by the trial judge, that the jury's verdict was "not the final decision," and that their decision was "automatically reviewable." Caldwell, 472 U.S. at 325 - 326. This Court found that the prosecutor's remarks improperly led the jury to believe "that the responsibility of the defendant's death rests elsewhere," Caldwell, 472 U.S. at 329, and characterized the remarks as "state-induced suggestions that the sentencing jury may shift its sense of

responsibility to an appellate court." Caldwell, 472 U.S. at 330.

In this case the jury was not told in argument, nor led to believe by the instructions of the court, that the responsibility for sentencing rested anywhere other than on its collective shoulders. As a portion of the evidence introduced in aggravation, the State submitted a certified copy of a Judgment and Sentence which reflected that the defendant had previously been convicted of the crime of First Degree Murder in the Thompson case. The defendant stipulated to the fact of the Thompson conviction, but objected to the Judgment and Sentence because it revealed that the defendant had received a sentence of death for the Thompson murder (Tr. VI, 44, 46 - 47). On the face of the Judgment and Sentence it was also reflected that the defendant had given notice of his intention to appeal

(J.A. 4 - 5). In telling the jury about the stipulations jury the trial court emphasized to them that the Thompson murder conviction was not final, and was on appeal (Tr. VI, 46).

The defendant asserts that his jury was led to believe that his death had already been decided, and that therefore the jurors were allowed to conclude that their sentencing decision was not important. Brief for the Petitioner, p. 16. This argument must fail on two counts. First, it assumes that the jury read and paid particular attention to that portion of the Judgment and Sentence which stated that the defendant had received the death penalty, but ignored the portion that stated he had given notice that he was going to appeal that conviction; and Second, it speculates that the jury relied on that piece of evidence to the exclusion of all the other evidence in the sentencing stage in

contravention to its instructions and determined that since the defendant already had one death sentence, he should therefore automatically receive another.

The face of the Judgment and Sentence revealed that it was not a final conviction; it stated that the defendant had given notice of his right to appeal. The trial court emphasized that the conviction was not final in his remarks to the jury (Tr. VI, 46, 47). The jury knew that the defendant's prior death sentence was subject to appellate review, and therefore might subsequently be overturned. In Caldwell the reference to appellate review was held sufficiently serious to undermine the confidence of the verdict. Here the defendant, on the one hand asks this Court to expand Caldwell to establish a per se rule against evidence of a prior death sentence, but ignores the effect of Caldwell on the evidence of the prior death

sentence. The jury was never informed that their decision in this case was subject to appellate review, their awesome sense of responsibility in assessing the death penalty was thus not undermined. The jury was informed, however, that the verdict in the prior case was to be subjected to appellate review, thus diminishing the finality and importance of that document under the holding of Caldwell.

The offending evidence in this case is not of the type addressed in Caldwell. The prosecutor here did not seek to diminish the jurors' sense of responsibility in making their sentencing decision. The trial court certainly did not do so, and in fact, the court's instructions emphasized that it was the jury's responsibility to reach a verdict as to sentence (J.A. 7, 8, 10, 12). The defendant must presume, in making his arguments, that the offending portion of the Judgment and Sentence was

the reason for the jury's sentence of death. Such a presumption must fail. It assumes that the jury ignored the judge's instructions that the jury was the determiner of the sentence (J.A. 12). It assumes that the jury ignored the fact that the prior Judgment and Sentence was on appeal, despite the trial court's instructions. And, it assumes that the jury determined that the prior sentence of death automatically required a present sentence of death. It is just as logical to assume, in a close case, where the jury is struggling with the decision to impose life or death, that the knowledge that the defendant already is facing one sentence of death may persuade them to assess life. Evidence that the defendant already has one death sentence may persuade the jury to feel sorry for him, and assess the lesser punishment.

It may well work to the defendant's advantage to have the jury informed about a prior death sentence. For example, in People v. Whitt, 798 P.2d 849, 859 - 860 (Cal. 1990) cert denied ____ U.S. ____, 112 S.Ct. 2816, 115 L.Ed.2d 988 (1991) and People v. Anderson, 801 P.2d 1107 (Cal. 1990) cert denied ____ U.S. ____, 112 S.Ct. 148, 116 L.Ed.2d 113 (1991) the California appellate court found that the defendants there had tactical reasons for declining to object to the court's disclosures about the defendants' death sentences. Both of the defendants in those cases argued that they had experienced "Death Row redemptions" in mitigation, claiming that they had changed their lives since their incarceration. The California cases indicate that there are valid reasons why a capital defendant might want evidence that he had previously received a death sentence placed before the jury.

In a federal habeas case, the defendant claimed that evidence that he had a prior death sentence, which had been vacated, diminished the jury's sense of responsibility and was impermissible under Caldwell. The Fourth Circuit concluded that the evidence, even when taken together with the trial court's continual references to the jury's sentencing "recommendation," had no effect on the verdict. Gaskins v. McKellar, 916 F.2d 941 (4th Cir. 1990) cert denied ____ U.S. ____, 112 L.Ed.2d 18, 115 L.Ed.2d 1102 (1991). The Circuit distinguished the Caldwell cases cited by the defendant, thus:

Moreover, in each case Gaskins cites finding a Caldwell violation, the suggestion to the jury that its decision was merely advisory was explicit and obvious. Nowhere in this case did anyone even imply that the jury's recommendation was non-binding.

Gaskins v. McKellar, 916 F.2d at 953. Likewise, in this case, no one implied that the jury's sentence would be non-binding.

The cases cited below all involve jurors' knowledge of a defendant's prior death sentence at the time they are seated for jury duty. In these situations the jurors knew of the prior death sentence even before they rendered their verdict in the guilt/innocence stage of the proceedings. The Respondent respectfully submits that these cases are instructive, and on point. It is much more logical to assume that knowledge that a defendant had previously committed murder and been sentenced to death would affect the first stage guilt verdict than that it would affect the second stage sentencing verdict.

In State v. Bell, 393 S.E.2d 364 (S.C. 1990) cert. denied Bell v. South Carolina, 498 U.S. 881, 111 S.Ct. 227, 112 L.Ed.2d 182 (1990) the defendant claimed that the

jurors' knowledge of his prior death sentence violated the holding in Caldwell and diminished their sense of responsibility in determining his sentence. The jurors knew of the defendant's prior death sentence before the first stage guilt determination. However, during voir dire, each of those jurors stated that they could set aside any previous impression or opinion and render a verdict based on the evidence presented in the courtroom. The South Carolina court stated:

[W]e also reject Bell's argument that the jurors' knowledge of the previous death sentence diminished their sense of responsibility in deciding what sentence to impose. . . We find that the reasoning of Caldwell does not control the case at bar. The jurors here disavowed themselves prior to their qualification of any bias or prejudice against the appellant, specifically with respect to his previous sentence of death.

Bell, 393 S.E.2d at 368. And, in State v. Atkins, 399 S.E.2d 760 (1990) cert denied ___ U.S. ___, 111 S.Ct. 2913, 115 L.Ed.2d 1076 (1991) the defendant contended that two jurors who had read in the newspaper that the defendant had a prior death sentence should have been removed for cause. The South Carolina Court disagreed, and after finding that both jurors stated they would be guided by the law, the evidence, and no other consideration, found that the jurors were qualified to sit.

In another voir dire knowledge case, Turner v. Commonwealth, 364 S.E.2d 483 (Va. 1988) cert denied 486 U.S. 1017, 108 S.Ct. 1754, 100 L.Ed.2d 216 (1988) a prospective juror indicated that his knowledge that the defendant had previously received a death sentence, although vacated, might affect his decision. After reviewing the entirety of the prospective juror's answers, the Virginia Court found

that the trial court's refusal to strike the juror for cause was not error.

In the dissent in Caldwell, Justice Rehnquist wrote:

[I]n general the Eighth Amendment is satisfied where the procedures ensure that the sentencer's discretion is 'suitably directed and limited so as to minimize the risk of wholly arbitrary and capricious action.'

Caldwell, 472 U.S. at 348. Justice Rehnquist also recognized that the Court's prior cases taught "that a death sentence need not be vacated in every case where the procedures by which it is imposed are in some way flawed." Caldwell, *ibid*.

While the Oklahoma Court held that the prior death sentence evidence was improperly disclosed to the defendant's jury in the sentencing stage, it also found that the evidence could not have affected the jury's sentencing determination. The Court of Criminal Appeals found that the

admission of the evidence did not violate the defendant's due process rights.

In Darden v. Wainwright, 477 U.S. 168, 184 n. 15, 106 S.Ct. 2464, 91 L.Ed.2d 144 (1986) this Court noted that Caldwell was only relevant to certain types of comments which mislead the jury as to its role in the sentencing process in a way that allows the jury to feel less responsible than it should for the sentencing decision. No such comments or instructions are present here. The jury was not mislead as to its role in the sentencing process. Evidence of the Thompson death sentence did not constitute a Caldwell violation in the Sarfaty sentencing proceeding.

B. Evidence of a Defendant's Prior Murder Conviction is Relevant Evidence to which the Sentencing Jury is Entitled.

The sentencer in a capital case is entitled to all relevant information in order to make the best informed and reasoned decision possible as to what

sentence to apply to that individual defendant. "What is essential is that the jury have before it all possible relevant information about the individual defendant whose fate it must determine." Jurek v. Texas, 428 U.S. 262, 275, 96 S.Ct. 2950, 49 L.Ed.2d 929 (1976).

A defendant's prior criminal record and/or activity has long been approved by the state courts and this Court as relevant information to which the sentencing jury is entitled. Woodson v. North Carolina, 428 U.S. 280, 305, 96 S.Ct. 2978, 49 L.Ed.2d 944 (1976) (plurality opinion); Van Woundenberg v. State, 720 P.2d 328, 336 - 337 (Okla. Crim. App. 1986). The defendant acknowledges this precedent, but asserts that the sentence imposed for a prior crime has no relevance in the sentencing determination.

The Oklahoma Court of Criminal Appeals held that the evidence of the death

sentence rendered in the Thompson case should not have been admitted in this case. However, the Respondent does not concede that holding was necessarily required. In Commonwealth v. Beasley, 479 A.2d 460 (Pa. 1984) the defendant claimed that it was error for the State to introduce, during the sentencing stage of a capital case, evidence that the defendant had previously been convicted of killing a police officer and had received a sentence of death for that crime. The Pennsylvania Court held that the sentence received for the prior crime was relevant evidence to which the jury was entitled:

The nature of an offense, as ascertained through examination of the circumstances concomitant to its commission, has much bearing upon the character of a defendant, and, indeed, without reference to those facts and circumstances, consideration of "convictions" would be a hollow process, yielding far less information about a

defendant's character than is relevant.

Convictions are defined by the essential and necessary facts upon which they are based, and judgments of sentences flow naturally from, and form an integral part of, those convictions.

Beasley, 479 A.2d at 465 (emphasis added). The Pennsylvania Court held that there was no error in the admission of the prior sentence, and specifically rejected in a footnote the defendant's contention "that the jury regarded his life as not being truly in its hands," as "unfounded speculation." Beasley, *ibid*, n. 5.

In Sumner v. Shuman, 483 U.S. 66, 107 S.Ct. 2716, 97 L.Ed.2d 56 (1987) rev'd in part Penry v. Lynaugh, 492 U.S. 302, 109 S.Ct. 2934, 106 L.Ed.2d 256 (1989) this Court struck down a Nevada statute which mandated a sentence of death for any inmate convicted of murder while that inmate was serving a sentence of life imprisonment

without the possibility of parole. This Court acknowledged that the mandatory death sentence impermissibly interfered with the jury's ability to consider the defendant's mitigating evidence. The Court stated:

This Court has recognized time and again that the level of criminal responsibility of a person convicted of murder may vary according to the extent of that individual's participation in the crime.

Sumner v. Shuman, 483 U.S. at 79. Because that level of culpability varies according to each crime, informing the jury of the sentence imposed gives that body more information about the prior crime. As the Pennsylvania Court acknowledged, the sentence is an integral part of the crime, and serves to offer insight into that crime.

In its Bill of Particulars filed against the defendant in the Sarfaty case, the State alleged four aggravating circumstances. Two of those were: that

there was a probability that the defendant would pose a continuing threat to society, and that the defendant had a prior felony conviction. The State used the evidence of the Thompson murder to prove both aggravators. Because the Thompson case was subsequently reversed due to improper joinder, the Court of Criminal Appeals struck the prior violent felony conviction aggravator, but held that evidence of the Thompson murder was still relevant evidence and properly considered as evidence of "continuing threat."

Of course, it is well settled that a crime need not be adjudicated to be considered as evidence in support of the "continuing threat" aggravating circumstance. Jurek v. Texas, supra; Johnson v. State, 665 P.2d 827 (Okla. Crim. App. 1983). The Thompson conviction was not vacated because of insufficiency of the evidence, but because of improper joinder.

It was still relevant evidence to consider in support of this aggravating circumstance.

The Court of Criminal Appeals considered this issue, and found that "the fact that Appellant's conviction for [the Thompson] murder was not final does not affect the admissibility of evidence of this offense," for the purpose of proving the continuing threat aggravator. The Court then held:

Our decision is not altered by the fact that Appellant's conviction for the Thompson homicide has been reversed and remanded for a new trial. (Citation omitted). As the case was not reversed on the basis of insufficient evidence of guilt, the facts of the Thompson homicide remain relevant evidence which the jury in the instant case should consider in determining the appropriateness of the death sentence.

Romano, 847.P.2d at 389. The Court then, in its reweighing analysis, found that the evidence was sufficient to support the

continuing threat aggravator. Romano, 847 P.2d at 394.

The Judgment and Sentence from the Thompson case was relevant evidence for the jury to consider. The Court of Criminal Appeals ruled that the death sentence should not have been disclosed to the jury, but the Respondent submits that holding is not necessarily constitutionally required. As the Pennsylvania Court above noted, evidence of the sentence is an integral part of the conviction. Evidence of the sentence imposed gives the sentencing jury more relevant information about the severity of the defendant's prior crime. Thus, the State submits the Court of Criminal Appeals could have properly held that the sentence rendered in the Thompson case was relevant evidence to which the jury was entitled. Since the jury was never instructed or admonished that it was not the final decision maker as to the

defendant's sentence in the Sarfaty case, evidence of the Thompson murder did not serve to undermine the reliability of the Sarfaty verdict.

Nothing in the evidence of the Thompson conviction and sentence could have led the defendant's jury to ignore the mitigating evidence which was presented. The defendant called eleven (11) witnesses to the stand during the second stage, including himself. The instructions fully advised the jury on the importance of mitigating evidence (J.A. 9). The defendant was not hindered in his presentation of, nor the jury's consideration of, the evidence in mitigation.

Nor was evidence of the Thompson conviction and sentence "materially inaccurate." The case of Johnson v. Mississippi, 486 U.S. 578, 108 S.Ct. 1981, 100 L.Ed.2d 575 (1988), cited by the

defendant, is inapplicable here. In Johnson v. Mississippi the prior murder evidence was not introduced to show any aggravating circumstance other than the defendant had a prior felony conviction. Evidence of the Thompson murder was used by the State to support two different aggravating circumstances. The Judgment and Sentence, though later reversed, was still relevant evidence to prove the "continuing threat" aggravating circumstance. The Court of Criminal Appeals did strike the "prior violent felony conviction" aggravator as a result of the Thompson reversal. In addition to the Judgment and Sentence in the Thompson case, the State also presented witnesses during the sentencing stage who testified as to the defendant's involvement in the Thompson murder. Therefore, any infirmity with the Judgment and Sentence caused by its later reversal was harmless error as

applied to the "continuing threat" aggravating circumstance.

II.

THE OKLAHOMA COURT'S HARMLESS ERROR ANALYSIS IN THIS CASE WAS CONSTITUTIONALLY PROPER, IN ACCORD WITH OTHER JURISDICTIONS, AND WAS CORRECT UNDER THE FACTS OF THIS CASE.

The Oklahoma Court of Criminal Appeals found that "evidence of the imposition of the death penalty by another jury is not relevant in determining the appropriateness of the death sentence for the instant offense," but then found that in this case, the admission of evidence of the prior death sentence "did not so infect the sentencing determination with unfairness as to make the determination to impose the death penalty a denial of due process." Romano, 847 P.2d at 391.

The Court specifically found that evidence of the Thompson death sentence, while erroneously admitted did not constitute a violation under Caldwell.

In deciding the issue on direct appeal, the Oklahoma Court of Criminal Appeals acknowledged this Court's holding in Caldwell and specifically found that the defendant's jury was not misled to believe that the responsibility for a determination of the appropriate sentence rested elsewhere. Romano, 847 P.2d at 390.

Acknowledging that it was possible that learning of a prior death sentence could diminish the jury's sense of its role, the Court of Criminal Appeals focused on the instructions given to the jury in this case.

The jury was instructed that it had the responsibility for determining whether the death penalty should be imposed. They were informed of their role as factfinders, that the weight and value of testimony and evidence was for them to determine, that they should not surrender their own judgment to that of any witness or item of evidence, and of their duty to follow the law in reaching their conclusion. It was never

conveyed or intimated in any way, by the court or the attorneys, that the jury could shift its responsibility in sentencing or that its role in any way had been minimized. The instructions given to the jury provided sufficient guidance as to how their judgment should be exercised. In this light, it is highly unlikely that the jury's sense of responsibility would have been diminished based upon knowledge of the prior imposition of the death sentence.

Romano, 847 P.2d at 391. The Court did not abandon the issue there, however, but continued its analysis using that "greater degree of scrutiny of the capital sentencing determination" specified by this Court in California v. Ramos, 463 U.S. 992, 998, 103 S.Ct. 3446, 3452, 77 L.Ed.2d 1171 (1983). Under that "heightened standard" the Court again considered the fact of the mention of the Thompson death sentence in the sentencing stage here, and found:

While evidence of the imposition of the death

penalty by another jury is not relevant in determining the appropriateness of the death sentence for the instant offense, the admission of this evidence did not so infect the sentencing determination with unfairness as to make the determination to impose the death penalty a denial of due process.

Romano, 847 P.2d at 391 (emphasis added).

It is difficult to understand how the Court's analysis, above, does not meet with the constitutional standards set forth by this Court. Compare the above standard to the statement in Caldwell that the prosecutor's statements, "if left uncorrected, might so affect the fundamental fairness of the sentencing proceeding as to violate the Eighth Amendment." Caldwell, 86 L.Ed.2d at 246.

The Court of Criminal Appeals did not exceed its jurisdiction in finding the evidence harmless, nor in considering the effect of the evidence in the context of

the sentencing proceedings. The Oklahoma Court's analysis of the impact of the evidence in the second stage here is akin to the Court's ability to reweigh the aggravating and mitigating evidence after one aggravator has been stricken (which was also done in this case). This Court has approved that practice, stating that "appellate sentencing, if properly conducted, would not violate due process of law." Clemons v. Mississippi, 494 U.S. 738, 110 S.Ct. 1441, 1447, 108 L.Ed.2d 725 (1990).

In Walton v. Arizona, 497 U.S. 639, 110 S.Ct. 3047, 111 L.Ed.2d 511 (1990) it was stated:

Moreover, even if a trial judge fails to apply the narrowing construction or applies an improper construction, the Constitution does not necessarily require that a state appellate court vacate a death sentence based on that factor. Rather, as we held in Clemons v.

Mississippi, 494 U.S. ____ (1990), a state appellate court may itself determine whether the evidence supports the existence of the aggravating circumstance as properly defined or the court may eliminate consideration of the factor altogether and determine whether any remaining aggravating circumstances are sufficient to warrant the death penalty.

Walton, 111 L.Ed.2d at 528 (Emphasis Added). Under the holding of Walton, the state appellate court may not only reweigh any remaining aggravating circumstances, but can even, in the first instance, apply constitutionally proper narrowing factors to an overbroad aggravating circumstance in determining whether or not the evidence supported that aggravator. The Court of Criminal Appeals acted well within its discretion in its treatment of the prior death sentence.

Even if this Court disagrees with the Oklahoma Court and finds that the introduction of the evidence in this case

was a Caldwell violation, harmless error analysis is still allowed. Caldwell does not demand a per se rule requiring reversal. The defendant urged the Tenth Circuit to accept that position in Hopkinson v. Shillinger, 888 F.2d 1286 (10th Cir. 1989) cert denied 497 U.S. 1010, 110 S.Ct. 3256, 111 L.Ed.2d 765 (1990). In that case the prosecution made statements which arguably violated the rule in Caldwell. The petitioner urged the Court to adopt a "no effect" standard, i.e. the reviewing Court must find that the violation had "no effect on the sentencing decision," in order to affirm the decision. Hopkinson acknowledged that this "no effect" standard was, for all practical purposes, a per se rule requiring reversal any time a violation of Caldwell is found. After an exhaustive discussion of this Court's standards of review on constitutional challenges, and the

treatment of the issue by other Circuits, the Tenth Circuit adopted a "substantial possibility" test. Thus,

[I]f a violation exists, . . . whether there is a substantial possibility that the prosecutor's statements, taken in context, affected the sentencing decision.

Hopkinson v. Shillinger, 888 F.2d at 1295.

The Oklahoma Court of Criminal Appeals applied an even higher standard in its harmless error analysis in this case. The Court found that "it is **highly unlikely** that the jury's sense of responsibility would have been diminished based upon knowledge of the prior imposition of the death sentence," and "the admission of this evidence did not so infect the sentencing determination with unfairness as to make the determination to impose the death penalty a denial of due process." Romano, 847 P.2d at 390, 391.

This Court has recognized that "not every imperfection in the deliberative process is sufficient, even in a capital case, to set aside a state-court judgment." Zant v. Stephens, 462 U.S. 862, 885, 103 S.Ct. 2733, 77 L.Ed.2d 235 (1983).

Oklahoma is not alone in its determination that this type of error may be harmless. Despite the defendant's contentions to the contrary, many States that have considered the issue refuse to apply a per se reversible error rule to this type evidence.

Even Illinois, which is cited by the Petitioner extensively in his brief as one of the States which has addressed the issue, refuses to apply a per se reversible error rule. While Illinois does hold that it is error for a jury to be informed that a capital defendant has previously been

sentenced to death⁴, that State has also held that an inadvertent reference to a defendant's prior death sentence did not constitute reversible error. People v. Brisbon, 544 N.E.2d 297, 304 (Ill. 1989) cert denied 494 U.S. 1074, 110 S.Ct. 1796, 108 L.Ed.2d 797 (1990). Florida has also applied this harmless error analysis. For example, in Sireci v. State, 587 So.2d 450 (Fla. 1991) cert denied ____ U.S. ____, 112 S.Ct. 1500, 117 L.Ed.2d 639 (1992) it was held that the prosecutor's reference to the prior death sentence did not prejudice the defendant or play a significant role in the resentencing proceeding, so as to warrant a mistrial.⁵

⁴People v. St. Pierre, 588 N.E.2d 1159 (Ill. 1992) cert denied ____ U.S. ____, 113 S.Ct. 381, 121 L.Ed.2d 297 (1992).

⁵See also State v. Williams, 657 S.W.2d 405, 414 (Tenn. 1983) cert denied 465 U.S. 1073, 104 S.Ct. 1429, 79 L.Ed.2d 753 (1984) in which it was held there was no prosecutorial misconduct in the State's reference to the defendant's prior death

In a federal habeas corpus proceeding, the petitioner claimed that he had been denied a fair state trial due to pretrial publicity. He maintained that area newspapers carried front page stories that disclosed that he had previously received a death sentence in another case. The Fourth Circuit denied relief, finding that the reports proceeded the defendant's sentencing by more than a year, and were reported in a straightforward manner. That Court stated:

Although the prejudicial information that Willie had cited was publicized in Washington Parish, we do not find that these disclosures were so inherently prejudicial that a jury formed from the parish's inhabitants could be presumed to be biased.

sentence, where the defendant had stipulated to his prior convictions and sentences.

Willie v. Maggio, 737 F.2d 1372, 1387 (4th Cir. 1984) cert denied 469 U.S. 1002, 105 S.Ct. 415, 83 L.Ed.2d 342 (1989).

In State v. Bradley, 538 N.E.2d 373 (Ohio 1989) cert denied 497 U.S. 1011, 110 S.Ct. 3258, 111 L.Ed.2d 768 (1990) the defendant claimed that his counsel was ineffective for not objecting to the admission of a police report, which contained, among other things, a reference to the defendant's prior death sentence. The Ohio Court found:

We do not believe that this rises to the necessary level of prejudice. To hold otherwise would be to conclude that it is reasonably probable that after hearing evidence that appellant committed the murder and that he had previously been convicted of a murder and was confined in a penal facility when the latest incident occurred, the jury found appellant guilty and recommended the death sentence solely because the police report indicated that appellant had previously been sentenced to death. We do

not find this conclusion justified.

Bradley, 538 N.E.2d at 382 - 383.

Similarly here, it is not reasonable to assume that the jury, having found the defendant guilty of the present murder, and having been informed that he had previously been convicted of another murder, sentenced him to death solely because of the prior death sentence.

In Boyde v. California, 494 U.S. 370, 110 S.Ct. 1190, 108 L.Ed.2d 316 (1990) the defendant claimed that one of the jury instructions prevented consideration of his mitigating evidence. In defining the standard of review, this Court stated:

[T]he proper inquiry in such a case is whether there is a reasonable likelihood that the jury has applied the challenged instruction in a way that prevents the consideration of constitutionally relevant evidence. Although a defendant need not establish that the jury was more likely than not to have been

impermissibly inhibited by the instruction, a capital sentencing proceeding is not inconsistent with the Eighth Amendment if there is only a possibility of such an inhibition.

Boyde, 494 U.S. at 380. The Court also noted that in order to prove other constitutional violations, the defendant must establish a reasonable likelihood that the trial result would have been different. Boyde, *ibid*, n. 4.

This Court has applied the harmless error rule to: coerced confessions - Arizona v. Fulminante, 499 U.S. 279, 111 S.Ct. 1246, 113 L.Ed.2d 302, 318 (1991); the admission of evidence obtained in violation of the Sixth Amendment right to counsel - Satterwhite v. Texas, 486 U.S. 249, 108 S.Ct. 1792, 100 L.Ed.2d 284 (1988); constitutionally overbroad jury instructions in a capital sentencing proceedings - Clemons v. Mississippi, 494 U.S. 738, 110 S.Ct. 1441, 108 L.Ed.2d 725

(1990); and a host of other constitutional errors. See Arizona v. Fulminante, 113 L.Ed.2d at 329.

As explained in Fulminante, the "common thread" connecting the harmless error cases is that each involved "trial error," which this Court defined as:

[E]rror which occurred during the presentation of the case to the jury, and which may therefore be quantitatively assessed in the context of other evidence presented in order to determine whether its admission was harmless beyond a reasonable doubt.

Arizona v. Fulminante, 113 L.Ed.2d at 330. The error here is that type addressed in Fulminante - it is an error in the trial process and not an error infecting the entire framework of the proceedings. Arizona v. Fulminante, 113 L.Ed.2d at 331.

The Respondent urges this Court to accept the Oklahoma Court's assessment of the damage of the Thompson death sentence evidence in light of the other evidence

which was presented during the Sarfaty sentencing stage. However, this Court may also review the record de novo in order to determine harmlessness. Satterwhite v. Texas, 486 U.S. at 258.

The defendant in this case offered a list of seventeen (17) separate items of mitigation which the trial court accepted and submitted to the jury (J.A. 9). After the Court of Criminal Appeals invalidated the prior violent felony conviction aggravator, there remain three (3) valid aggravating circumstances. Evidence established that the murder of Roger Sarfaty was especially heinous, atrocious or cruel in that the victim's death was preceded by torture or serious physical abuse. Medical evidence showed that Mr. Sarfaty had struggled for his life. He had been forcefully restrained with his wrists and ankles bound. He was struck in the head approximately five times with a long

blunt object, and ultimately died of strangulation, which occurred after three to five minutes of slow suffocation. Romano, 847 P.2d at 386 - 387. The circumstantial evidence also established that the defendant knew Sarfaty and determined to kill him to prevent being identified as Sarfaty's robber. Romano, 847 P.2d at 387. This evidence supports the jury's finding that the murder was committed to avoid arrest or prosecution. The "continuing threat" aggravating circumstance was supported by the evidence that the defendant had previously murdered another man, Lloyd Thompson and the defendant's other felony convictions. Romano, *ibid*.

When the sentencing stage evidence is considered in conjunction with the jury instructions, it becomes apparent that evidence of the Thompson death sentence

evidence could not have affected the jury's verdict in the Sarfaty case.

Far more convincing to the jury than the bare Judgment and Sentence which was introduced here were the facts of the Thompson murder which were testified to by different witnesses. The underlying facts of the Thompson murder were important to establish the continuing threat aggravating circumstance.⁶ It is illogical to assume that the jury placed more weight on the court document than they did the live testimony of the witnesses.

⁶In Oklahoma, a defendant may stipulate to his prior violent felony convictions when the State alleges that aggravator, so that the State is prohibited from going into the facts of the conviction to establish the requisite violent act. Brewer v. State, 650 P.2d 54, 61 - 63 (Okla. Crim. App. 1982). However, a defendant may not so stipulate when the conviction is alleged to prove the continuing threat aggravator because the underlying facts of the crime are what is important in establishing that aggravator. Smith v. State, 819 P.2d 270, 277 (Okla. Crim. App. 1991).

The Oklahoma Court's analysis of the issue was proper, and this Court should also find that any error in the admission of the evidence was harmless.

CONCLUSION

This Court should affirm the decision of
the Court of Criminal Appeals.

Respectfully submitted,

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